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HARRY ISAACS & ORS

v.

BERITA HARIAN SDN BHD & ORS

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KANG HWEE GEE JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: W-02-580-2004]
14 JULY 2010

C

CIVIL PROCEDURE: *Trial - Conduct of proceedings - Whether in breach of natural justice - Statement of witness who was not present in court - Whether could be admitted - Whether judge committed jurisdictional error - Rules of the High Court 1980, O. 35A - Non-compliance of*

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This was an appeal against the decision of the High Court in dismissing two consolidated defamation suits against the respondents after a full trial. The action arose from a newspaper report in Berita Harian. The appellants had contended that the article in its natural and ordinary meaning was meant and understood to refer to the appellants and thereof had suffered serious injury to their reputation and business. The High Court judge, however, had accepted the respondents' defence of qualified privilege on the ground that the publication was of public interest and was not actuated by malice. The thrust of the appellants' submission in this appeal was the manner by which the High Court judge had conducted the trial. The appellants submitted that the finding arrived at by the court was based on the statement of a witness who was not present at the trial whose statement should not have been admitted.

Held (allowing the appeal with costs)

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Per Kang Hwee Gee JCA delivering the judgment of the court:

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(1) The trial was conducted in breach of natural justice in that the learned judge only heard the appellants' side of the story before making the decision that he did. Where evidence in a trial is to be introduced through a prepared witness statement under O. 35 of the Rules of the High Court 1980, as in this case, it was obligatory to call that witness to tender his

statement before the court, to read it and be cross examined. In failing to comply with O. 35A, it was clear that the statement of the only witness Ibrahim Muhamad (marked as 'SD1') whom the respondents intended to call could not be admitted as evidence; nor the respondents' defence as set out in their statement of defence. (paras 11 & 13)

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- (2) The learned judge had committed a significant jurisdictional error and any decision arising therefrom would not be valid. It was appropriate to quash the decision and remit the case back to the High Court with a directive that the respondents' only witness be examined and cross-examined in accordance with O. 35A of the Rules of the High Court 1980 and a decision be made only after hearing the witness. (para 15)

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Bahasa Malaysia Translation Of Headnotes

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Ini adalah rayuan terhadap keputusan Mahkamah Tinggi menolak dua guaman fitnah yang disatukan terhadap responden-responden selepas satu perbicaraan penuh. Kes ini timbul dari satu laporan surat khabar di dalam Berita Harian. Perayu-perayu berhujah bahawa artikel dalam makna semulajadi dan biasa bermaksud dan difahamkan merujuk kepada perayu-perayu dan oleh itu perayu-perayu telah mengalami pencemaran kepada reputasi dan perniagaan. Hakim Mahkamah Tinggi, bagaimanapun, telah menerima pembelaan perlindungan bersyarat responden-responden atas alasan penerbitan tersebut adalah untuk kepentingan awam dan bukan dibuat dengan niat jahat. Hujahan teras perayu-perayu di dalam rayuan ini adalah mengenai cara Hakim Mahkamah Tinggi telah menjalankan perbicaraan. Perayu-perayu berhujah bahawa dapatan mahkamah adalah berdasarkan pernyataan seorang saksi yang tidak hadir di perbicaraan dan oleh itu pernyataannya tidak sepatutnya diterima masuk.

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Diputuskan (membenarkan rayuan dengan kos)

Oleh Kang Hwee Gee HMR menyampaikan penghakiman mahkamah:

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- (1) Cara perbicaraan dijalankan telah melanggar keadilan semulajadi kerana yang arif hakim hanya mendengar versi cerita perayu-perayu sebelum membuat keputusan yang telah dibuatnya. Di mana keterangan di dalam perbicaraan perlu diperkenalkan melalui pernyataan saksi di bawah A. 35 Kaedah-Kaedah Mahkamah Tinggi 1980, seperti di dalam kes ini, ia adalah

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- A wajib untuk memanggil saksi itu untuk memberi pernyataannya di hadapan mahkamah, untuk membaca dan untuk diperiksa balas. Dengan kegagalan mematuhi A. 35A, ia adalah jelas pernyataan satu-satunya saksi Ibrahim Muhamad (ditanda sebagai 'SD1') yang responden-responden berniat untuk
- B memanggil tidak boleh diterima masuk sebagai keterangan; mahupun pembelaan responden-responden seperti yang telah dinyatakan di dalam pernyataan pembelaannya.
- (2) Yang arif hakim telah melakukan satu kesilapan bidangkuasa penting dan apa-apa keputusan yang berbangkit darinya tidak
- C sah. Ia adalah bersesuaian untuk membatalkan keputusan tersebut dan menghantar balik kes itu kepada Mahkamah Tinggi dengan perintah bahawa satu-satunya saksi responden-responden diperiksa dan diperiksa balas mengikut A. 35A
- D Kaedah-Kaedah Mahkamah Tinggi 1980 dan satu keputusan dibuat hanya selepas mendengar saksi itu.

Legislation referred to:

Rules of the High Court 1980, O. 35A

- E *For the appellants - Dato' Sri Muhammad Shafee Abdullah (Vasanthi Rasathurai with him); M/s Shafee & Co*
For the respondents - Harjinder Kaur (Josephie Sui with her); M/s Sharizat Rashid & Lee
- F *[Appeal from High Court, Kuala Lumpur; Civil Suit Nos: S2 (S1)-23-16-1995 & S1-23-17-1995]*
- Reported by Suhainah Wahiduddin*

G **JUDGMENT**

Kang Hwee Gee JCA:

- [1] This is an appeal against the decision of the High Court in dismissing two consolidated defamation suits against the
- H respondents after a full trial.
- [2] The action arose from a newspaper report in Berita Harian in its 4 June 1987 issue captioned:
- I Sekolah swasta, firma guaman disiasat. Markas sulit sebar Kristian.

[3] The 1st respondent was the publisher of the newspaper Berita Harian which published the article in its 4 June 1987 issue. The 2nd respondent was the writer of the article; the 3rd respondent the company that owned the newspaper. A

[4] The 1st suit S2 (S1)-23-16-1995 was filed by the appellants Harry Isaacs and a private school Sekolah Grammar Kuala Terengganu. The 2nd suit S1-23-17-1995 was filed by the appellant Dato' Victor Isaacs, the proprietor of the legal firm M/s Isaacs & Partners. B

[5] The content of the alleged defamatory report in the Berita Harian read: C

Sebuah sekolah swasta dan firma guaman di sini dikatakan menjadi pusat penyebaran agama Kristian kepada orang Islam di negeri ini yang dibuat secara senyap dan sulit. D

Pusat itu mendapat pelbagai kemudahan dan sumber kewangan dari luar untuk membiayai kegiatannya yang dikatakan sudah dapat mengkristiankan beberapa keturunan Melayu di sekitar bandar Kuala Terengganu. E

Berita Harian difahamkan Jabatan Hal-ehwal Agama Terengganu (JHEAT) sedang menyiasat kegiatan yang dijalankan oleh sekolah swasta dan firma itu selepas mendapat maklumat daripada orang ramai. F

Pusat itu dikatakan mula menyemaikan nilai-nilai agama Kristian kepada beberapa pelajar dan kakitangan mereka sejak beberapa tahun lalu. G

Sumber-sumber berkata orang Islam yang terbabit dengan gerakan Kristian itu, diberi ceramah secara bersembunyi. Biasanya mereka dijemput pada waktu malam menghadiri majlis sosial yang diadakan. H

Pendakwah Kristian itu juga menawarkan pelbagai hadiah lumayan dan orang Islam yang terikut dengan gerakan itu sanggup berkahwin dengan gadis beragama Kristian. I

Walaupun undang-undang di negeri ini tidak membenarkan sebarang tempat ibadat didirikan oleh mana-mana kumpulan agama selain daripada Islam, tanpa kebenaran kerajaan negeri, tetapi beberapa pusat pengembang agama Kristian sudah wujud di bandar ini.

- A Kumpulan itu dikatakan menyewa bangunan-bangunan tertentu yang dijadikan pusat ceramah dengan menjemput orang ramai menghadiri perjumpaan yang diadakan.
- B Kerajaan negeri juga difahamkan sudah diberitahu mengenai perkara itu. Bagaimanapun jurucakapnya tidak mahu membuat apa-apa ulasan setakat ini.
- C Sumber-sumber itu berkata JHEAT sudah menghantar beberapa pegawai penguatkuasa menyiasat perkara itu dan keputusannya mungkin dapat diketahui tidak lama lagi.
- D Sebelum ini, JHEAT sudah mengingatkan umat Islam di negeri ini supaya berwaspada terhadap gerakan dakwah Kristian yang sedang pesat di negeri ini sekarang.
- [6] The gist of the appellants' complaint is that the article in its natural and ordinary meaning was meant and understood to refer to the appellants, although they were not specifically named therein. The appellants claimed that in consequence thereof they suffered serious injury to their reputation and business and therefore should be compensated in damages.
- F [7] The respondents did not deny that the article was published by the 1st respondent, but contended that they did not refer to the appellants or that they were defamatory of the appellants and in any case the respondents were protected by qualified privilege.
- G [8] The learned High Court judge heard the submissions on 25 March 2004. He found the words complained of were defamatory and that the words published in the 1st respondent newspaper could reasonably be understood to refer to the appellants. He rejected the respondents' defence of justification, but accepted their defence of qualified privilege on the ground that the publication was of public interest and was not actuated by malice.
- H [9] The thrust of the appellants' submission before us in this appeal was the manner by which the learned judge conducted the trial. It is submitted that the finding arrived at by the court was based on the statement of a witness who was not present at the trial whose statement should not have been admitted.
- I

[10] We were directed to pp. 403 and 404 of the Record of Appeal which disclose that: A

- (i) The appellants called four witnesses who gave evidence by their prepared witness statements. They were duly cross-examined and re-examined pursuant to O. 35A of the Rules of the High Court 1980 before they rest their case. B
- (ii) On the other hand, the respondents could only produce the witness statement of their only witness, Ibrahim bin Muhamad whom they had intended to call. C
- (iii) As the witness was not present in court, counsel for the respondents requested for a short postponement.
- (iv) Counsel for the appellants then informed the court that he would require the witness to be cross-examined. D
- (v) The judge appeared to have brushed aside the requests. Instead he ordered that the witness statement of the witness (marked "SD1") be taken as read.
- (vi) He directed the parties to submit their written submission for his decision to his secretary by 22 March 2004 and to make an oral submission before him on 25 March 2004. E

[11] The trial, it would appear, was conducted in breach of natural justice in that the learned judge only heard the appellants' side of the story before making the decision that he did. Where evidence in a trial is to be introduced through a prepared witness statement under O. 35 of the Rules of the High Court 1980, as in this case, it is obligatory to call that witness to tender his statement before the court, to read it and be cross-examined. F
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[12] The rule is implicit under O. 35A which reads:

- (1) Where the parties agree, the Court may allow any witness in an action commenced by writ to give his evidence in chief by way of affidavit tendered and read at the hearing before the witness is cross-examined on his affidavit. H
- (2) A copy of each affidavit tendered and read shall be furnished to the other party.

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- A [13] In failing to comply with O. 35A in this case, it is clear that the statement of the only witness Ibrahim bin Muhamad (marked as “SD1”) whom the respondents intend to call cannot be admitted as evidence; nor the respondents’ defence as set out in their statement of defence.
- B [14] The position would be different if the other party, the appellants in this case, had agreed that the statement be taken as read and to waive its right to cross-examine the witness in which case, it had to be assumed that he was prepared to accept the witness statement for its worth. It would then be perfectly in
- C order for the learned judge to proceed to consider the evidence and to arrive at a decision one way or other.
- D [15] Substantive issues as set out in the written submissions of the parties filed earlier were canvassed before us in this appeal. However, we deemed it unnecessary and inappropriate to consider them at this stage as we are convinced that the learned judge had committed a significant jurisdictional error and any decision arising therefrom would not be valid. Rather, we consider it more appropriate to quash the decision and to remit the case back to
- E the High Court with a directive that the respondents’ only witness be examined and cross-examined in accordance with O. 35A of the Rules of the High Court 1980 and a decision be made only after hearing the witness.
- F [16] We are unanimous in our decision that this appeal should be allowed with costs to follow the event in the High Court.

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